No. 22,424

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WESTERN BUILDING MAINTENANCE COMPANY AND SERVICE AND MAINTENANCE EMPLOYEES UNION LOCAL 399, BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondents.

BRIEF OF WESTERN BUILDING MAINTENANCE COMPANY.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE.

I.

Background.

Respondent Western Building Maintenance Company (hereinafter called "Western"), and all of the Parties in Interest named in the original Complaint, are employers of employees in the building maintenance business. Respondent Service and Maintenance Employees Union, Local 399, Building Service Employees International Union, AFL-CIO (hereinafter called "Union") represents building maintenance employees in the Southern California area. The employers are all party to iden-

tical industry-wide collective bargaining agreements with the Union. The collective bargaining agreement in effect between Western and the Union during the time in issue was operative from August, 1963 to August, 1966 [G.C. Ex. 3].[1] The agreement contained union-security provisions, including a requirement that employees join the Union and pay dues, which collective bargaining agreement language was as follows:

> "ARTICLE III — HIRING AND EMPLOYMENT
>
> Section 1. Union security
>
> A. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing. It shall be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall, on or immediately after the thirtieth day following the beginning of such employment or thirty days after the effective date of this Agreement, whichever is later, become and remain members in good standing of the Union.
>
> B. The Employer shall inform all employees, at the time of hire, who come under the scope of this Agreement of the existence and terms of this Agreement, and the obligations of such employees as to Union membership.
>
> * * *

[1]All references conform to the Board's method of designation.

"ARTICLE IV—CHECK OFF

Section 1. Payment of Membership Initiation and Dues

A. The Employer agrees to a check-off for the payment of Union dues and initiation fees and to deduct such payments from the wages of all employees and remit same to the Union in accordance with the terms of signed authorizations of such employees, and according to the method set forth below, and the Employer shall be the agent for receiving such monies and the deduction of said dues by the Employer shall constitute payment of said dues by the employees." [G.C. Ex. 3].

These union security provisions were conceded to be valid and are not in issue [R. 65, 73].

The Board found that Western unlawfully implemented the provisions of the collective bargaining agreement by requiring that, as a condition of employment, its newly hired employees join the Union and pay dues prior to thirty (30) days after the beginning of their employment. Western denies that the Board's finding is supported by substantial evidence upon the record considered as a whole and contends that its only activities were those lawfully required of it to implement the lawful union security clauses contained in its collective bargaining agreement with the Union.

II.
Western's Hiring Practices.

Prospective employees of Western were customarily interviewed initially by a receptionist. If the applicant passed this initial screening, he was then interviewed by any one of seven supervisors. If accepted for employment, the applicant was given an employment package, consisting of a withholding exemption certificate, application for membership in the Union, payroll deduction authorization card, designation of beneficiary, application for employment and personnel check sheet. During the interview, the employee was advised that Western was a union company and that membership in the Union and payment of union dues was required as a condition of employment. Nothing was normally stated as to the time in which the applicant had to join the Union or commence to pay union dues. The new employee was required to return all of the documents in the employment package, filled out and signed, as soon as possible. An employee who had joined the Union would not be paid unless he returned at least the withholding exemption and payroll deduction authorization.[2] Generally, an applicant who had joined the Un-

[2]There is a seeming contradiction in the stipulated facts since on the one hand it is stated that as a condition to receiving their first paycheck, a newly hired employee was required to have turned in a withholding exemption certificate and payroll deduction authorization. On the other hand, it was stipulated that some employees refused to sign the authorization cards or join the Union in the thirty (30) day period and were nevertheless continued in employment. It was further stipulated that no dues were deducted without a payroll deduction authorization first having been signed. The only way to interpret these stipu-

ion completed and returned all of the forms immediately. There is no evidence that any coercive measures were applied if the new employees failed to join the Union and pay dues within the thirty (30) day period. In fact some new employees of Western refused to sign the application for membership and payroll deduction authorization. They were nevertheless employed and continued in Western's employ until after their first thirty (30) days of employment, at which time they were then required to join the Union. No dues were deducted from such employees during the thirty (30) day period [G.C. Exs. 8 and 9; Tr. 107-108].

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lated facts consistently is to interpret them as meaning that if the new employee had joined the Union, a signed payroll deduction authorization was required before he received his first paycheck, in order to enable Western to lawfully deduct dues, but that if the new employee had decided not to join the Union, no payroll deduction authorization was required and he received his first paycheck at the normal payroll period.

ARGUMENT.

There Is No Substantial Evidence on the Record as a Whole to Support the Board's Findings That Western Required New Employees to Join the Union and Authorize the Checkoff of Dues as a Condition of Employment Prior to the Expiration of the Thirty (30) Day Period.

Section 8(b)(1)(A) forbids employers to restrain or coerce employees in the exercise of their Section 7 rights, including the right to refrain from joining unions, except under the provisions of Section 8(a)(3). The latter section permits an employer and a union representing a majority of its employees to ". . . require as a condition of employment membership therein (the union) on or after the thirtieth day following the beginning of such employment. . . ."

Under the lawful terms of its collective bargaining agreement, Western was required to advise applicants for employment, at the time of hire, of their obligation to join the Union. As a part of carrying out these duties under the lawful collective bargaining agreement, Western made available to new employees the documents needed to join the Union and authorize deduction of union dues. No coercion, threats or statements were made to express the requirement that such new employees were obligated to join the Union prior to the thirty (30) day period. As a general rule, most new employees promptly joined the Union. However, on occasion, new employees refused to join the Union prior to the expiration of the grace period. No coercive or retaliatory measures on the part of Western followed such a refusal. Such employees continued in their employment, unaffected by their refusal.

The absence of any prohibited coercion is emphasized when two cases dealing with the issue in question are analyzed and contrasted with the facts of this case. In *N.L.R.B. v. Cadillac Wire Corp.*, 290 F. 2d 261 (2nd Cir. 1961) new employees were given a union application containing a dues checkoff authorization upon being employed. The employees were then directed to the Shop Steward who advised them that they had to sign the card within a day or two. The court properly held that such action constituted non-permissible coercion. In *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966) the Board found that there was no unlawful coercion. The Board stated:

> "In view of the lawful union-security and voluntary checkoff provisions of the applicable contract, we are unable to conclude on the record before us that the supervisors did more than merely advise employees of their contractual obligations to join the Union and of the availability of the checkoff as a method of paying lawfully required union dues." 157 N.L.R.B. at 587.

The conduct in issue here amounts to no more than the approved conduct described in *Keller Plastics Eastern, Inc., supra.*

Undeterred by the absence of any evidence to show physical, verbal or other forms of coercion or restraint on the part of Western, the Board sought to involve Western in illegal conduct by referring to various notices sent by the Union to the maintenance contractor employers, including Western. The Union has maintained that these notices were nothing more than an accurate amplification of the lawful procedures required

by the collective bargaining agreement. The Board interprets those notices as requiring unlawful procedures to be followed. But none of this is of any significance in assessing the lawfulness of Western's conduct. If Western's conduct is lawful, all of the notices sent to it, lawful or unlawful, cannot change that fact. The significance of this point is highlighted when the Board's dismissal of forty seven (47) of the original Parties in Interest is considered. Some were dismissed because of their failure to meet Board jurisdictional standards; but some were dismissed because of the absence of any evidence that they had engaged in the prohibited activity in issue [R. 62-63; Tr. 31-34, 101-102]. Since all of the dismissed employers received the same notice that Western received, the mere receipt of such notices can no more indict Western then did such receipt indict the dismissed employers.

In addition to the absence of any indirect or direct evidence of restraint or coercion, there is present positive evidence that the newly hired employees that did join the Union within the thirty (30) day period, did so voluntarily. Thus, the Union membership application forms expressly provided that such applications were voluntarily completed and submitted. These forms stated "I of my own free will, hereby apply for membership in the Service and Maintenance Employees Union, Local 399 of Los Angeles. . . ." The payroll deduction cards contained a similar provision that "I hereby certify that this authorization is made freely and without any interference, restraint or coercion from any person or persons whatsoever." It is unlikely that employees would sign a card containing such language if they believed they were being coerced into signing them.

At the very least, in the absence of any affirmative evidence of coercion, such expressions of free and voluntary assent to membership in the Union must carry substantial weight in assessing the lawfulness of Western's conduct.

Conclusion.

The Board has through unsupported innuendo and implication attempted to establish that Western coerced its newly hired employees to join the Union prior to passage of the statutory time. The evidence shows that no employee was coerced to join the Union and no new employee was subjected to any adverse treatment upon his failure to join the Union during the protected period. For these reasons it is respectfully submitted that no part of the Board's order directed to Western should be enforced.

COOPER, TEPPER & PLANT,
By LEON M. COOPER,
Attorneys for Western Building Maintenance Company.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

FOSTER TEPPER

APPENDIX A.

Pursuant to Rule 18.2(f) of the Rules of the Court:

(Numbers are to pages of the Reporter's Transcript.)

General Counsel's Exhibits

Number	Identified	Received
3	41	42
8a	106	106
8b	106	106
9	106	109